

Westek, Inc. and Wayne Avery. Case 10-CA-27217

January 23, 1995

DECISION AND ORDERBY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On May 18, 1994, Administrative Law Judge Philip P. McLeod issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Gaye Nell Hymon, Esq., for the General Counsel.
Townsell G. Marshall, Jr., Esq. (Constangy, Brooks & Smith), for the Respondent.

DECISION**STATEMENT OF THE CASE**

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on March 4, 1994, in Thomaston, Georgia. The case originated from a charge filed by Wayne Avery against Westek, Inc.¹ (the Respondent), on December 8, 1993.² Thereafter, on January 27, 1994, a complaint and notice of hearing issued which alleges, inter alia, that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), by threatening employees with unspecified reprisals if they engaged in union activities.

In its answer to the complaint, Respondent admitted certain allegations, including the filing and serving of the charge; its status as an employer within the meaning of the Act; the status of United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC, as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for General Counsel and Respondent both filed timely briefs with me which have been duly considered.

¹ The name of Respondent was amended at the hearing to reflect the new name following emergence from bankruptcy proceedings on February 7, 1994.

² All dates herein refer to 1993 unless otherwise stated.

Upon the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT**I. JURISDICTION**

Westek, Inc., formerly Dominion Engineered Textiles, is, and has been at all times material, engaged in the manufacture and sale of cord, yarn, and fabric. In the regular course and conduct of its business, Respondent annually purchases and receives at its Thomaston, Georgia facility goods valued in excess of \$50,000 directly from suppliers located outside the State of Georgia.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES**A. Background**

Respondent's facility in Thomaston, Georgia, has operated as a manufacturing plant of industrial textiles for at least 35 years. During that time, it has operated under at least three names, including Uniroyal Goodrich, Dominion Engineered Textiles, and now Westek. At the time of these proceedings, Respondent employed approximately 850 to 900 employees.

Since 1988, at least three union campaigns have been conducted among employees at the Thomaston facility. The most recent campaign resulted in a petition being filed with the Board in Case 10-RC-14231 in March 1992, by United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC. An election was conducted in May 1992 in which 385 votes were cast for the Union and 597 votes cast against union representation. The results of that election are still pending before the Board on objections to conduct affecting the results of the election.

B. Gary Wayne Avery

Wayne Avery has worked at the Thomaston facility for almost 35 years. For the last 17 to 18 years, Avery has been head tire cord shipping clerk. Throughout his many years at the Thomaston facility, Avery has been a model employee. Vice President of Manufacturing Albert Messer, who is the person alleged to have unlawfully threatened Avery, repeatedly testified that Avery was a tremendous "untapped resource" with leadership abilities.

Avery has also been the consummate union activist and supporter. Avery actively and openly supported the Union during all three organizing campaigns. In 1988, during the first campaign, Avery served on the nine-person in-house union organizing committee. Avery has attended union meetings, talked with fellow employees, distributed union literature, and testified in Board proceedings on behalf of the Union trying to organize employees at the Thomaston facility.

ity. In spite of the Union's failed attempts, Avery has continued to vigorously support the Union.

C. Albert Louie Messer

Albert Messer was hired by Respondent as vice president of manufacturing in February 1993 to help turn around a failing business. Messer, in turn, hired Marion Nivens in May 1993 as operations planning manager and Robert Johnson in June 1993 as human resource manager. All this new management team was hired to help bring Respondent successfully out of bankruptcy proceedings.

Messer testified that when he was hired by Respondent, "it was on its last breath." Messer succinctly described the Thomaston facility: "The place was dirty, it was filthy . . . windows were broken. From a morale stand point, I think the folks were pretty much at the end of their rope."

In her posttrial brief, counsel for General Counsel insists that Messer invisioned the Union as being the source of all Respondent's economic woes, but this is far from being true. In fact, Messer pretty much laid the blame directly at the feet of management, testifying:

We had severe cost problems with several million dollars of cost in excess of standard due to poor manufacturing performance. We had returns from our customers and we were losing money. As we said, we were bleeding profusely and we were hemorrhaging. It was an absolute disaster, there is no other way to say it.

Messer described a business in which almost one-fourth of all raw materials were ending up as waste. Messer's most important function in helping Respondent emerge from bankruptcy involved cutting costs, reducing waste, increasing employee morale, and improving productivity. Messer testified that he set as his first two goals basic housekeeping to repair and improve the Thomaston facility and improving employee morale.

Messer testified that in order to begin improving employee morale, he spent the first several days at the Thomaston facility simply circulating throughout the facility and meeting employees on a one-to-one basis. It was then that he first met Wayne Avery.

After those first few days, Messer implemented a series of meetings with employees, the purpose of which he characterized as "for you to get to know me and me to get to know you." Messer testified that if Respondent was to survive and realize its fullest potential, everyone had to pull in the same direction. Messer estimated that he spent approximately 30 percent of his time talking to and meeting with employees individually as well as in groups. Messer instituted a program of weekly breakfast and/or luncheon meetings with randomly selected groups of employees to permit them to ask questions and to allow Messer to sell his vision for Respondent.

Messer testified candidly that it was very early in these meetings with employees that he learned Wayne Avery was one of the most active union supporters.

D. The July Conversation Between Messer and Avery

During July 1993, Messer was told by some employees that Avery was being critical of the way Messer was doing his job. Messer testified, "me being the type of fellow I am,

I don't have any trouble saying, look, if you've got a problem, let's sit down and talk about it . . . so I went out to the floor and Wayne was out doing his job."

It was approximately July 14 when Messer approached Avery. According to Avery, Messer stated that they had a problem to work out. Avery testified that Messer then stated he understood Avery was a big union supporter and that he, Messer, had heard Avery was blaming him for errors on the vacation checks.

Messer denied that he said anything to Avery about Avery being involved with the Union. Messer added, however, that it was common knowledge Avery was involved with the Union. According to Messer, he approached Avery and asked if they could "talk a minute." Messer then described their conversation as follows:

I said, I've got a problem . . . I understand you've got a problem with me, that you're being critical of me and the way I'm running my job. That you're questioning my motives and so forth. Now, you're entitled to your opinions, Wayne, as everyone else is, but you're not entitled to go around talking about it. I said, if you've got a problem with me I think that you know that you certainly have the right to come say look, we need to talk about something."

Messer testified Avery responded by telling Messer that supervisors did not like Messer and were afraid of him. Messer responded he was trying to get everyone "in the boat pulling the same way" and that "rather than finding fault with the way things were and in this case finding fault with me and the way I run my job and voice that fault, perhaps [you] could contribute more if you were really concerned about the well being of the plant and the people in the facility, join in and do things to help the plant." According to Messer, Avery responded that "he wasn't going to fall into that trap again."

I had the distinct impression that both Avery and Messer were essentially telling the truth as they recalled it, but that neither was telling the full truth. The whole truth is more accurately reflected by a combination and composite of both their testimony and/or by something lying part way between the testimony of either of them. In this case, given Messer's self-proclaimed desire for openness between individuals, I have no doubt that Messer started out the conversation saying they had some "problem." Even Messer's version says as much. I also have no doubt that somewhere during this conversation Messer shared with Avery the fact he knew Avery was an avid union supporter. I credit Avery in that regard. I also credit Messer, however, that he told Avery all the things Messer described in his testimony.

This conversation is not alleged as violating the Act. Rather, counsel for the General Counsel points to the conversation as evidence of Messer acknowledging Avery's involvement with the Union. I rely on it for that limited purpose. Counsel for General Counsel would also have me find that reference to a "problem" suggests animus on Messer's part. In the context of this specific conversation, I cannot agree. Messer's reference to there being a "problem" was simply a way of initiating the conversation inviting Avery's criticism or comment.

E. The Events of November and December 1993

On or about November 3, corporate CEO Bill Davis and Messer conducted a series of meeting with employees to discuss pay and policy changes, Respondent's emergence from bankruptcy proceedings, and insurance information. Operations and Planning Manager Marion Nivens testified credibly that on the day of these meetings, he was notified by Avery's immediate supervisor, Bill Smith, that Avery was refusing to attend the meeting. Nivens went and spoke with Avery. At that point, Avery did not refuse to attend the meeting, but did ask Nivens whether the meeting was mandatory. Nivens told Avery to return to his work area while Nivens found out whether the meeting was mandatory. Nivens later returned and told Avery the meeting was indeed mandatory, and Avery then acquiesced. It was necessary, however, to have Avery attend a different meeting from the one to which he was originally assigned because that one had already concluded. On cross-examination, Avery admitted that he did not trust Respondent's new management team and "he did not believe" new corporate CEO Bill Davis.

During November 1993, Respondent began to conduct a number of timestudies of numerous jobs in order to attempt to reduce cost by making them more efficient. On November 30, immediately after reporting to work, Avery learned that one of these timestudies would focus on his position that day. Rather than work, Avery checked out and went home sick. This resulted in Respondent not being able to conduct the fourth day of a 5-day timestudy for Avery's job position. While Avery denies going home sick in order to frustrate completion of the timestudy, it is apparent that Avery viewed the study as personal harassment, for part of Avery's original charge with the Board alleges Respondent to have conducted this timestudy as harassment for Avery's union activity. After the charge was investigated by the Board's Regional Office, that portion was withdrawn by being amended out. Operations Manager Nivens correctly accessed that Avery was less than pleased with having a timestudy done of his position. When Avery returned to work the following day, Nivens met with Avery and told Avery that the job was going to be studied whether or not Avery cooperated, but that Respondent would like to have his cooperation getting the job studied. Nivens testified credibly that Avery then reluctantly agreed to cooperate with future timestudies, and the job was indeed studied.

On December 1, Messer went to Avery at Avery's work area to praise him for doing a good job the previous day and to say "thank you." Messer testified credibly that the conversation "went down hill from that point on." Avery apparently complained that Nivens had reprimanded him concerning the timestudy. Messer assured Avery that no one was picking on him regarding the studies, that they "just had to be done." I credit Messer that Avery then went on to remark that he "hated to come to work," something he had never heard from Avery before. Messer admitted he asked Avery, "If you hate it that bad . . . why don't you just quit?" Avery responded that he could not find another job that paid him as much money. Both Messer and Avery agree that after talking some more, the conversation ended on an amiable basis.

F. The Alleged Unlawful Remarks

On December 3, Messer was passing through Avery's general work area when he stepped into a nearby office to use a telephone. While Messer was on the phone, Avery knocked on the door. After Messer was finished on the telephone Messer invited Avery in, and the two had another conversation. Messer testified credibly that Avery initiated this conversation by asking why he was being "harrassed" by management by the timestudy and "what he had to do to get things straightened out." Messer testified credibly he told Avery that he "did not believe in harrassing people, that the company treated everyone the same." Messer then went on to state that if management had made a mistake by implying that Avery was trying to avoid the timestudy, Messer was willing to apologize.

Messer admits he then shifted gears to a more personal conversation, telling Avery, "If we don't all start working together . . . then we are all going to suffer for it. We cannot survive if we have this distrust, if we have these walls and barriers built between us, and we simply have to overcome these things." Messer asked Avery, "Help me understand what it is that you distrust in management." Messer testified credibly that Avery stated, "personally, I don't have anything against you. I like you and you are kind of caught in the middle of this thing."

Messer admits that the subject of unions came up during this conversation, and that Messer himself raised this subject to relate Messer's own view point on why he disliked unions. Messer told Avery that his father had been a pipe-fitter, and when Messer had been a child, money had always been a problem until his father finally got a job in construction of a plant near their home. Money was suddenly no longer an issue. Then one day Messer's father came home "absolutely devastated" by having been laid off. Soon after that, Messer's father came home one day and recounted that he had been told by one of his fellow coworkers he had been laid off because he had not secretly tipped the union shop steward. Messer's father reported he had been told "if you don't slip the shop steward \$20 a week, you don't work, it's as simple as that." Messer admits he told Avery that from his own point of reference, when it came to unions, the union had taken food out of his mouth. According to Messer, Avery listened politely, but said nothing. As a result, Messer went back urging Avery that everyone had to "get in the boat, pull in the same direction." Messer testified Avery then said he needed to leave, and the conversation ended by Avery telling Messer, "I appreciate you being willing to talk to me" and "I pray for you every day and pray for this plant every day." At the end of the conversation, the two men shook hands.

Avery testified that after Messer told the story about Messer's father losing his job, Messer went on to state that there was nothing he disliked more in life than unions. According to Avery, near the conclusion of the story, Messer told Avery that Messer had heard Avery was the head of the union organizing campaign at Respondent's facility. According to Avery, Messer then stated that Avery had an attitude problem, adding that if Avery did not change his attitude, it would be "detrimental" to Avery.

Messer denied making either of these specific remarks attributed to him by Avery, particularly the remark that Avery's attitude would be "detrimental." Messer admitted,

however, he told Avery that he had difficulty contrasting what he had heard about Avery, namely that Avery “was responsible for all the heartache and troubles at the plant” with the Avery with whom he had “nice congenial conversations.” In response to questions from his own counsel, Messer denied making any reference to Avery’s “attitude,” but upon further questioning from me, Messer admitted that he simply did not recall whether he used the word “attitude.”

Analysis and Conclusions

As I have said once before above, I am convinced the whole truth of what was said between Messer and Avery is found in a composite of their testimony. Viewed in its entire context, I find that Messer did make some comment about the Union being “detrimental” to Avery, but that the comment was sufficiently ambiguous that it cannot be said objectively to constitute an unlawful threat of reprisal against Avery for engaging in protected activity.

Two things are clear to me in this case. First, that Messer did not intend to threaten Avery with any retribution for engaging in union activity. Unfortunately for Messer, one’s intent is not even relevant, much less determinative, in determining whether a supervisor’s remarks to a statutory employee are unlawful and proscribed by the Act. The second thing which is equally clear to me is that Avery personally construed Messer’s remarks as an implied threat of retaliation if he continued engaging in union activities. At the same time, however, Avery was just as convinced that the time-study of his position represented some form of retaliation for those same activities. Unfortunately for Avery, his personal reaction to Messer’s remarks are equally irrelevant in deciding whether they carried an implied and unlawful threat of retaliation for engaging in union activity. The Board has long held that an objective, dispassionate analysis of actual remarks will be used to determine whether they carry an implied and unlawful threat of retaliation for engaging in protected union activity.

I have serious doubt that in the conversation on December 3 Messer stated he had been “checking” on Avery’s union activities. I have no doubt, however, that in both the conversations on July 14 and again on December 3, Messer stated he had heard that Avery was a big union supporter. I so find. There is no question that Messer dislikes unions, and told Avery so in their conversation on December 3. I cannot by any stretch of the imagination, however, agree with counsel for General Counsel that Messer saw Unions as the “single driving force which lead to Respondent’s financial woes.” Messer pretty much laid the blame for that directly on management. Rather, Messer expressed a very personal dislike for unions because, correctly or incorrectly, Messer viewed his father as having lost a very important job by failing to pay off a union steward. In the precise context of those remarks, even assuming that Messer told Avery his “attitude” favoring unions could be “detrimental” to him,

it is just as reasonable to conclude that Messer was suggesting Avery’s support for the Union might backfire in a similar way as it is to conclude that Messer was himself threatening reprisal for Avery’s union activity. This is particularly true in view of the fact that in this same conversation Messer had already made the statement to Avery that Respondent was not and would not harass Avery for engaging in union activity.

I agreed with Respondent that Avery read far more into Messer’s remarks than he should have. Avery’s predisposition for doing so is really quite apparent from the overall events outlined above. Avery was no doubt seeing major changes in his workplace. A new management team, which Avery admits he did not trust, was implementing a new way of doing things. Avery had actually declined to attend, and later only reluctantly attended, a meeting being held by the new corporate chief executive. When a time-study was being done of Avery’s position, Avery checked out of work and went home sick. When Respondent spoke to him about that fact, Avery felt he was being reprimanded. Finally, on December 3, Avery himself initiated a discussion with Messer about that perceived harassment in which he quickly construed certain remarks by Messer as being threatening. All in all, this case strikes me as a simple misunderstanding between two men who are groping unsuccessfully to understand one another. I find that in fact Messer’s remarks were sufficiently ambiguous that objectively they cannot be said to carry an implied threat of reprisal against Avery for engaging in union activity. Accordingly, I shall dismiss the complaint herein.

CONCLUSIONS OF LAW

1. Respondent Westek, Inc. is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not threaten employees with unspecified reprisals if they engage in union activities as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

It is hereby recommended that the complaint be dismissed in its entirety.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.